

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6209

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
NO. 77-6209

REV. DONALD L. JACKSON,

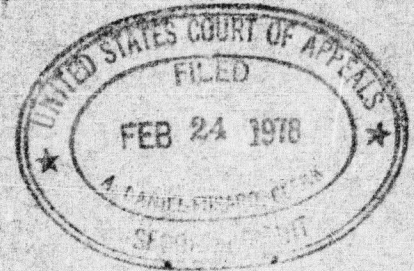
Plaintiff-Appellant,

- against -

UNITED STATES OF AMERICA and
STATE OF NEW YORK,

Defendants-Appellees.

On Appeal from the United States District
Court for the Western District of New York



BRIEF FOR DEFENDANT-APPELLEE
STATE OF NEW YORK

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BRIEF FOR DEFENDANT-APPELLEE
STATE OF NEW YORK

Preliminary Statement

This is an appeal by the plaintiff from a judgment of the United States District Court for the Western District of New York (CURTIN, J.) which dismissed plaintiff's complaint against the defendants.

Issue Presented for Review

Did the District Court properly dismiss the complaint?

Statement of the Case

The plaintiff commenced this action against the State of New York and the United States of America in the United States District Court for the District of Columbia. Venue was changed to the United States District Court for the Western District of New York.

This case was previously before this Court when the plaintiff appealed from the denial by the District Court of a motion for a preliminary injunction and to convene a three-judge Court. In affirming the District Court, this Court stated^{*}:

"For substantially the reasons stated by Judge Curtin in his opinion, dated March 28, 1975, we conclude that he did not err in refusing to grant preliminary injunctive relief and to convene a three-judge court. Moreover, it appears that appellant has previously litigated a similar challenge to Article 6, section 20 of the New York Constitution. Jackson v. City of Buffalo, Civil No. 1971-478 (W.D.N.Y. July 26, 1973), appeal dismissed for failure to perfect, Dkt. No. 75-7310 (2d Cir. June 24, 1975). The other issues raised by appellant are an amalgam of matters from the same lawsuit, which is apparently still pending before Judge Curtin, and a number of other actions."

^{*} A copy of this Court's Order dated November 21, 1975 is set forth in the Appendix to this brief.

Decision by the District Court

The District Court stated that the plaintiff's complaint is prolix, difficult to follow and deals with causes asserted by the plaintiff in other actions which were either dismissed or withdrawn.

The Court stated that with regard to the plaintiff's claims against the State of New York the Court lacks jurisdiction to hear them, since the plaintiff alleges that he is a citizen of the State. Furthermore, if this is to be considered an action under 42 USC, § 1983, the complaint must fail because the State is not a person within the meaning of 42 USC, § 1983.

The Court went on to state that in regard to the plaintiff's claims against the Federal government, the plaintiff has attempted to litigate similar claims in prior suits (citing, Jackson v. Statler Foundation [CIV 71-592 and CIV 74-185]). These suits were dismissed in a decision by the District Court dated July 18, 1975*.

The Court stated that with regard to any other claims, the plaintiff's claims as to each are completely deficient and none state a claim.

The Court granted judgment dismissing the complaint against both defendants.

* The plaintiff's appeal from the judgment dismissing the complaints was dismissed by this Court on March 3, 1976 (Docket No. 75-6118).

ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED
THE COMPLAINT FOR LACK OF JURISDICTION.

In paragraph 2 of his complaint, plaintiff alleges that he is a resident of the State of New York and City of Buffalo. The plaintiff is barred by the doctrine of sovereign immunity as embodied in the Eleventh Amendment to the United States Constitution from suing his own state in Federal Court (Hans v. Louisiana, 134 U.S. 1 [1890]).

Moreover, to the extent that the complaint might be read to claim any violation under 42 USC, § 1983, the State of New York is not a person within the meaning of this statute (Monroe v. Pape, 365 U.S. 167, 191 [1961]; Sires v. Cole, 320 F. 2d 877 [9th Cir., 1963]).

In addition as previously held by this Court, any constitutional arguments that might be made by the plaintiff are wholly insubstantial and frivolous. The frivolous nature of the plaintiff's appeal in the instant case is demonstrated by the inconsistent positions taken by the plaintiff during the course of litigation. In a memorandum filed with this Court in opposition to a motion by the United States of America to dismiss a prior appeal, the plaintiff stated*:

"* * * in view of the fact Defendant State of New York was only a week late in moving against the complaint, Appellant, would then Move to withdraw the Complaint against Defendant State of New York, which would terminate the litigation."

*The motion to dismiss plaintiff's appeal was granted August 17, 1976 (Docket No. 76-6068). A previous motion to dismiss another appeal was granted November 22, 1974 (Docket No. 74-2094).

The plaintiff now urges on the instant appeal that it was error for the District Court to grant judgment dismissing his complaint. In the meantime the plaintiff ignored the many opportunities given by the District Court to demonstrate that there was any validity to his complaint. Instead the plaintiff has hidden behind long and confusing statements mixing excerpts from reported cases and statutes with meaningless theories. The plaintiff has carefully avoided showing that there is any factual validity to his complaint*.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT
DISMISSING THE COMPLAINT SHOULD BE
AFFIRMED.

Dated: February 23, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant-Appellee
State of New York

RUTH KESSLER TOCH
Solicitor General

MICHAEL F. COLLIGAN
Assistant Attorney General

of Counsel

* The plaintiff, for example, has resisted all attempts by the United States of America to take his oral deposition. The plaintiff ignored notices and had to be served with subpoenas by the Marshall which were still ignored.

FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of November one thousand nine hundred and seventy-five

Present:

HONORABLE WILFRED FEINBERG

HONORABLE WALTER R. MANSFIELD

HONORABLE MURRAY I. GURFEIN

Circuit Judges,

REV. DONALD L. JACKSON,

Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA and STATE OF
NEW YORK,

Defendants-Appellees

No. 75-6051

Appeal from the United States District Court for the Western
District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York and was argued by ~~counsel~~ appellant pro se and by counsel for appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed. For substantially the reasons stated by Judge Curtin in his opinion, dated March 28, 1975, we conclude that he did not err in refusing to grant preliminary injunctive relief and to convene a three-judge court. Moreover, it appears that appellant has previously litigated a similar challenge to Article 6, section 20 of the New York Constitution. Jackson v. City of Buffalo, Civil No. 1971-478 (W.D.N.Y. July 26, 1973), appeal dismissed for failure to perfect, Dkt. No. 75-7310 (2d Cir. June 24, 1975). The other issues raised by appellant are an amalgam of matters from the same lawsuit, which is apparently still pending before Judge Curtin, and a number of other actions.

Judgment affirmed.

Wilfred Feinberg

Walter R. Mansfield

Murray I. Gurfein
U.S.C.JJ.

AFFIDAVIT OF SERVICE

Rev. Donald L. Jackson,
Plaintiff-Appellant,

-against-

United States of America and
The State of New York,
Defendants-Appellees.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

Beverly J. Smith, being duly sworn, says:
I am over eighteen years of age and a typist
in the office of the Attorney General of the State of New York, attorney
for the defendants-appellees herein.

On the 23rd day of February 1978 I served
the annexed brief for State of New York upon the
attorneys named below, by depositing three copies thereof,
properly enclosed in a sealed, postpaid wrapper, in the letter box
of the Capitol Station post office in the City of Albany, New York,
a depository under the exclusive care and custody of the United States
Post Office Department, directed to the said attorney s at the
addresses within the State respectively theretofore designated by
them for that purpose as follows:

Rev. Donald L. Jackson
P.O. Box 494
Buffalo, New York 14205

U.S. Atty. for Western District of New York
U.S. Court House
Buffalo, New York 14202
ATTN: Theodore J. Barns

Sworn to before me this

23rd day of February 1978

Cynthia Tiano

CYNTHIA TIANO
Notary Public, State of New York
Qualified in Albany County
Commission Expires March 30, 1978